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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

GLENN H. SEWELL,

Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,
a Delaware Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO, OR FOR AN ORDER REQUIRING EN BANC REVIEW BY, THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In this case, one party or the other submitted an intentionally misleading brief in order to lead the Circuit Court into a mistaken opinion. The Court acknowledged this happened, but refused to review to determine whether its opinion was in error, whether it had followed the false brief, and so refused to review whether it had done justice or injustice.

From this factual context, the following issues arise:

I. When an appellate court buys the Brooklyn Bridge from a man in a checkered suit, what duty has it to rectify the situation?

II. Is it not the duty of an appellate court to wrestle with the tar baby of attorney misconduct, when only by doing so can it be assured that it has not done injustice to a litigant?

III. Is it appropriate for an appellate court, when it acknowledges that it does not know the facts of the case due to it being misled as to them by one attorney or the other, to dispose of the case on the basis that by referring the matter of misconduct to an outside agency over which it has no control, here a Bar Commission, it is doing justice?

IV. When an appellate court has to face the fact that it has been misled, is it appropriate for that appellate court to refuse to review the Findings of Fact of the trial judge on second, non-jury trial, and to deny any hearing on the issue of fraud on the court on a

motion pursuant to Rule 60(b)(3) FRCP.

V. Due process. As a litigant's interest in a judgment is a constitutionally protected property right, does due process entitle him to have his case factually reviewed on appeal?

VI. Encouraging candor by litigants. Whether it is the duty of an appellate court, when it acknowledges that one party or the other has attempted to mislead it, to determine what misconduct has occurred and deal with the offenders appropriately, so that such conduct is discouraged, so that the stature of the law and the courts is not diminished and to serve as a warning that appellate briefs must be candid so appellate courts can more expeditiously and accurately perform their functions.

VII. Punitive damages. Whether punitive damages are not appropriate to deter an intentional industry-wide labor practice expressly forbidden by safety laws, under circumstances in which each violation has a low probability of death or injury, but the violations are repeated so many thousands of times each year that mathematically such consequences are bound to occur?

VIII. As the United States Supreme Court acts as initial reviewer of errors occurring in the first instance in the United States Circuit Courts, shouldn't Certiorari or other appropriate relief, as here return to the Circuit Court with an order requiring an en banc review, issue more readily than in cases where appellate courts have had prior opportunity to correct error occurring at lower judicial levels?

IX. Does an attorney have the duty to persevere when his client is the victim of judicial injustice both in order to do justice to his client, and also to protect the judicial system of which he is a part?

X. Can it really happen in the federal courts of the United States that a party can lose a legitimate case because an appellate court cannot bring itself to admit it was misled, and that counsel before it have learned how to manipulate it?

XI. The Federal Rules of Appellate Procedure, 28(c) FRAP, allow a respondent to freely reject and restate the facts of a case. Should not this rule be revised to require the respondent, as many state courts require, to specifically cite to the record for each statement he denies and for such substitution he proposes, so as to bind him tightly to the facts and make it easier for the reviewing court to pinpoint and resolve disputes, and to identify the parties who stray from the record? (See Utah Rules of Civil Procedure, 75(p)(2)).

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PETITION FOR A WRIT OF CERTIORARI TO, OR FOR AN ORDER REQUIRING EN BANC REVIEW BY, THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Glenn H. Sewell, respectfully prays that a Writ of Certiorari issue to review the denial of his motion for hearing pursuant to Rule 60(b)(3), FRCP, alternatively for relief under the "All Writs Act," 28 USC §1651(a), (b).

Alternatively Petitioner seeks the court enter its Order requiring the Circuit Court grant Petitioner an

en banc hearing of his motion for hearing under Rule 60(b)(3) and 28 USC §1651(a), (b).

Petitioner believes an order of this court requiring the en banc hearing in the Circuit Court will be adequate for his purposes.

OPINIONS BELOW

The two opinions of the Court of Appeals, unreported, appear in the appendices hereto, the first opinion being Appendix A, and the second as Appendix C. The opinion of the District Court for the District of Utah, Central Division, appears as Apendix B.

The Circuit Court order denying petitioner a hearing pursuant to Rule 60(b)(3), FRCP, or relief pursuant to 28 USC 1651(a)(b), appears as Annex G.

JURISDICTION

The order of the Court of Appeals, Tenth Circuit, was dated and entered September 10, 1980, and this Petition for Certiorari is timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC, §1254, ¶1.

PROVISIONS OF LAW

CONSTITUTION OF THE UNITED STATES, AMENDMENT V.

> "No person shall be . . . deprived of life, liberty, or property without due process of law. . . ."

UNIFORM BUILDING CODE (UBC) is Appendix D.

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA) is Appendix E.
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STATEMENT OF FACTS

As petitioner had a fair trial, but was denied due process in the Circuit Court, this Statement of Facts must cover the actual facts of the accident, and also the events on appeal that led to dismissal of his case.

The interstices possible to alter a cases facts at the appellate level are the crux of this petition.

At trial, the judge and jury hear the testimony, and counsel are locked into argument and law consistent with that testimony.

To the contrary, on appeal the court knows nothing of the facts, and must rely on the briefs for the facts and for the law appropriate to those facts.

This case is a study in how an appellate court can be manipulated.

It is also a study in how difficult it is for the appellate court to acknowledge that it can be manipulated.

Here, a jury verdict, subsequently factually affirmed by the trial judge at second trial rested on the testimony of the respondent's own executives and employees.

The prevailing party, petitioner here, appealed, even though he had won, claiming that not only should he have had the general and special damages awarded

by the jury, but also punitive damages which the trial judge refused to allow to go to the jury.

The appeal was important to respondent, the company, because the precedent to be announced by the United States Circuit Court of Appeals would probably stop a financially rewarding work practice that the company had carried out continuously for many years. The practice would be stopped by the circuit decision because it was illegal and unsafe, producing deaths and injuries. The facts of the case themselves are quite clear, not complex, and they support the injured workman, petitioner.

Recognizing the complexities an appellate court has in evaluating facts, the company, through its lawyers, simply filed a fictional brief. In that brief, every important fact was intentionally altered, the workman's theory of law which was valid, was modified into a strawman theory which was not valid, the fact that the work was illegal was supressed in the company's brief, so that in sum the Circuit Court was faced with a brief setting forth a set of facts unrelated to the facts at trial, and wrote its opinion not realizing that the work project was illegal, and did not realize that the company insisted the work be done, by the independent contractors that it used, in that illegal manner.

The Circuit Court relying in good faith chose between two irreconcilably conflicting briefs by adopting the fictional brief and wrote its opinion based thereon.

This resulted in an appellate opinion contrary to the jury verdict.

On non-jury retrial, the trial judge summarized the facts showing them clearly to be in favor of the working man and opposed to the company's position. The trial judge, however, referred the matter back to the Circuit Court for further consideration stating that he was bound by is opinion of dismissal.

On second appeal, heard by a three judge panel, the Circuit Court had before it the Findings of Fact of the trial judge and also Petitioners brief meticulously outlining the falsities of the company's position in its prior brief. It affirmed its first opinion.

Based thereon, one judge dissented stating, "There has been a miscarriage of justice."

The concurring judge agreed factually with the dissent but nevertheless sided with the writer of the majority opinion for two reasons. First, he acknowledged that the briefs were irreconcilable and that one attorney or the other had misled the court, but dealt with this by referring the matter to the State Bar Commission of the attorneys as a solution to the ethical problem. In so doing he lost sight of the fact that he was denying justice to one party and rewarding the misleading party with a judicial victory. Second, he ruled that the second appeal was simply a belated attempt at rehearing of the first appeal and so ineffective. Nevertheless, he sided factually with the dissenting opinion.

The writer of the majority opinion had written the original majority opinion, and refused absolutely to review the findings of fact of the trial judge on second

trial, stating remarkably that there was no new evidence to be reviewed.

On subsequent submission of the matter to the Utah State Bar Commission, it refused to review the conduct of the Company's attorney, he being a past president of the State Bar Association, (see Appendix F) but bought Petitioner's attorney before it on charges of unethical conduct for having filed a brief in which he complained of misconduct of opposng counsel. After exhaustive factual hearing, the attorney was exonerated, it appearing that all of his charges of misconduct were specifically documented.

Accordingly, the case is one where a jury, a trial judge, a State Bar Commission and two appellate judges acknowledge that the petitioner has a legitimate case and is entitled to his verdict.

Only the single judge author of the majority opinion persists alone in the view that the case was properly decided by him on the first appeal.

When Petitioner filed his Rule 60(b)(3) Motion on review, the Circuit Court, acting through two judges, the majority and concurring judges, refused to reconsider the matter nor to submit it to the Circuit Court for en banc review as prayed, and summarily dismissed the working man's motion without hearing before a responsive brief from Respondent had even been filed.

Petitioner's back was broken by a cave-in of a dirt excavation wall 11½ feet high, at a service station owned

by Respondent. The excavation was to be used to house a gasoline tank. It's walls were vertical, neither sloped nor shored.

To avoid repetition, the reader is referred to the findings of Trial Judge Anderson, Appendix B and to the dissenting opinion of Circuit Judge Doyle, Appendix C. The heart of these findings was stated by Judge Anderson as follows:

> "Here the defendant company had vast experience in excavation and installation work, had an engineering department trained in precisely this kind of work and in this very community had previously contacted for many such jobs and been familiar with the local law requiring sloping. Notwithstanding, the company drew plans for the work leaving out the sloping, an expensive addition, and put it out to bid. The trial court was persuaded that under such circumstances, where the company gained an economic benefit from putting out a job for bid with a drawing of the work without sloping, an issue of whether this was negligence of the company should be presented to the jury, the theory being that such may be an exercise of control that would deprive the company of protection of the contract placing responsibility with the independent contractor, but without making the company the plainiff's employer."

The fundamental concept to be applied in understanding the factual problems at the appellate level is that on appeal, the party not entitled to favorable review candidly admit evidence supporting the opposing party. Petitioner was entitled to such favorable review.

Tennant v. Peoria & P.U.R. Co., 321 US 29 (1944), reh den 321 US 802, *Percival Construction Co. v. Miller and Miller Auctioneers*, 532 F.2d 166 (10th Cir., 1976).

The evidence taken at trial which led to Judge Anderson's factual conclusions was not admitted by respondent on appeal. As conclusions grow from evidence, this led the Circuit Court to wrong conclusions when it adopted the companies brief as the basis for its decision.

This specific testimony must be reviewed.

The job was illegal.

The Uniform Building Code was first enacted in 1924, and since has been generally adopted nationwide. It requires as a mandatory condition that no excavation over 5 feet deep be made without first obtaining an excavation permit. This permit will not issue unless the application indicates adequate detail for sloping or shoring to insure that the excavation can be done safely. OSHA has similar requirements. Because OSHA is enforceable by government, not private litigants, its use at trial was evidentiary of safe labor practice rather than the mandatory standard imposed by the UBC.

Because the excavation admittedly conformed with neither the Uniform Building Code nor OSHA, the company stipulated at trial to pertinent excerpts from

those being received as physical exhibits by the jury. They were appended verbatim to petitioner's original brief on appeal, and are appended here as appendices "D" and "E."

The independent contractor, Mr. Eckman, hired by the Company to do the job was per se negligent due to his violation of the safety law.

The only question at trial was whether respondent shared in Eckman's negligence.

The company's brief on appeal never mentions either the UBC or OSHA. This was for a purpose.

Its intent to mislead the Circuit Court is clear. *The UBC was the law of the case.* There was no possible legitimate manner in which the company could omit dealing with it in its brief. To do so though could well have led the appellate court to find the company was liable on a theory of non-delegable duty imposed by law.

Omitting this law from its brief was comparable to an auto accident litigant hiding on appeal that he admitted at trial that he ran a red light, and instead presenting his case on appeal as one of negligence being solely a matter of reasonable conduct as the only legal issue in a case with no traffic controls present.

In this, the company brilliantly succeeded.

Having been guided away from the basic, mandatory safety law of the case, the Circuit Court addressed itself to customary negligence issues such as the exist-

ence of known dangers, and never recognized the central fact that the work was specifically illegal.

The Circuit Court in its opinion, made no reference to the Uniform Building Code at all, and indicated no awareness that the project was illegal from the outset because of the failure to obtain the excavation permit, and in process of work by failing to have the excavation walls either sloped or shored.

In this, it followed respondent's brief which made no reference at all to the Uniform Building Code, but referred only vaguely to "technically required local ordinances." This omission of the Uniform Building Code and its specific requirements is reflected in the appellate opinion which indicates generally that if any laws were to have been complied with the contractor was to have done that.

Just as the Circuit Court failed to understand the basic and specific illegality of the project, its finding that respondent could reasonably rely on the contractor to comply with whatever general laws there were, was also based on respondent's brief which so stated, rather than the evidence.

On this point, the evidence was substantial. The contractor, Mr. Eckman, had over 30 years' experience in this specific line of work. Respondent's personnel who testified were a construction inspector, Mr. Howell, with over 20 years' experience, his superior, Mr. Neuzil, in charge of these projects for three states, and

his superior, Mr. Cameron, who was in charge of the entire Western States Marketing Region.

All of these witnesses testified that without a single exception respondent had never required the mandatory excavation permit from its contractors.

This course of conduct covered over 20 years and thousands of projects. Throughout that period, the companies written contract required its contractors to obtain the permit, but the company never in practice enforced the contract, but instead invariably approved and paid for work done illegally without the permit.

Accordingly, this contractual provision was absolutely waived by Respondent. Its purpose was to avoid the cost of sloping or shoring, and the simple mechanism it used was to avoid giving notice of its excavations to local government. It had learned it could succeed in this practice because as the excavations are only open one or two days, they would escape inspection.

For Respondent to admit either that the work was illegal, or that it invariably required that the work be done that way, would be virtually a confession of judgment, as it would not then be entitled to the innocent landowners exemption from liability.

On appeal, to avoid that consequence, the company stated repeatedly that it relied in entire good faith on the contract provision requiring the contractor to "obtain all necessary permits," and in good faith, believed he would do so.

In so stating, the company kicked 20 years' of experience under the carpet, and falsified the testimony of its own personnel. Its submitted to the appellate court facts that would win even though they were contrary to the testimony of its own witnesses.

Thus, the appellate court's finding that "Eckman was under a contractual duty to comply with proper procedures," is mistaken, a vital mistake of fact which changes the entire posture of the case.

The appellate court failed to realize that the written contract with proper immunizing language for respondent, had no function other than to immunize, because it had no relationship at all to respondent's invariable, actual trade practice.

Perhaps the most startling example of intentional falsifying bore on the issue of illegality of the work as found by the trial judge to be known by the company.

The UBC and OSHA requirements are part of standardized nation wide law. Both Mr. Cameron and Mr. Neuzil testified precisely that they knew these requirements and knew this job was illegal as were all the jobs like it. UBC is, after all, "Uniform."

The company could not admit it knew the job was illegal and still maintain its posture of good faith reliance that it believed the job was proceeding legally.

Accordingly, in an incredible distortion of the record, it stated in its appellate brief that it did not know and had no reason to know the "technically re-

quired local ordinances" and left these, if any, to the contractor. The Circuit accepted this as true.

Having disposed of the specific requirements of law as being the legal standard, the company had to persuade the appellate court that there was no claim against it arising for negligence from known dangers.

It did this by falsifying the facts relating to the accident itself.

The original Circuit Court opinion found that the work project was safe, in stable soil, and had no inherent hazards. In so finding, again it quoted respondent's brief which stated, "There was no evidence as to the cause of the cave-in," that the excavation was in "clay, which is stable," that no person who saw the excavation was aware of any hazards and that the excavation was safe.

Again, the testimony at trial was different from that claimed by defendant.

Petitioner had a key witness, qualified as an expert in soil mechanics, who testified that cave-ins are inevitable in excavations, the only question being whether they will occur when a worker is in the excavation doing his work of leveling its base so that the fuel tank can sit solidly. The expert's testimony was that moist soil is plastic, and that almost all underground soil is moist. He further testified that because soil weighs over 100 pounds per cubic foot, the pressure applied at the bot-

tom of an 11 foot excavation by the weight of earth above it acts on the plastic character of the bottom earth to force it to bulge out into the unsupported area. As it bulges, it moves downward separating it from the earth above, which then caves in.

This hazard analysis was confirmed by respondent's Mr. Neuzil, who has a degree in engineerng.

Mr. Neuzil testified on direct examination as a respondent witness, that he thought the excavation safe. On cross-examination, he not only made the above quoted admission of his knowledge of the hazards of cave-ins in general, but also admitted that he had been so concerned about the safety of this particular excavation that he had gone by the night before, but nevertheless did nothing, because he was bound by the industry practice of never sloping or shoring.

Again, the company had a problem, as to admit that the project was unsafe, and it knew it was unsafe, would probably lose the case.

Accordingly, it hid this evidence, and in its brief on appeal, urged the project was safe as follows.

Petitioner's key expert completely disappeared from respondent's brief, his testimony never mentioned, and the impeaching testimony by Mr. Neuzil was similarly omitted. This, in turn, led the Circuit Court to its mistaken conclusion that the work project was safe. In fact, it stated," Mr. Neuzil was concerned about the

safety of an open pit and felt the excavation was safe to work in." It entirely missed the actual evidence.

Yet another instance of misleading is that Judge Andrson and Judge Doyle both referred to respondent's economic gains by omitting sloping and shoring. At trial, appellant proved respondent had economic control of the manner of work.

The Circuit Court stated, to the contrary, that respondent paid for sloping and shoring. Respondent's brief so claimed. What was the evidence?

The contractor, Mr. Eckman, had 42 of these jobs to do at the time for respondent, had completed and been paid for a number of them, and all had been unsloped and unshored.

Mr. Neuzil added to this. He prepared the drawings and costs for the jobs, and then Mr. Cameron approved these before they were let out for actual bid. Both men admitted that the jobs made no allowance for the cost of sloping or shoring, made no allowance in the size of excavation shown in the drawings for the space involved in sloping or shoring, and any bid including the cost of sloping and shoring would be too high and not accepted by the company.

Mr. Mathis, partner of Mr. Eckman, testified that if he included the cost of sloping and shoring in a bid, he would not get the job, and if he included the cost

as an extra during course of work, he would not be paid.

Thus, Judge Anderson's and Doyle's findings are supported by the record, while the Circuit Court, led by respondent, is clearly in error on the vital point of respondent paying for sloping or shoring.

Mr. Cameron was in charge of the department which paid the contractors. He admitted that he couldn't remember a single instance in his entire experience with respondent in which he had paid for the full scale sloping or shoring required by law.

Why did the company state in its brief that it would pay for the cost of sloping or shoring when the evidence was opposite?

Again, this is simply another pivotal fact. The importance of this fact cannot be overstated.

If the company admitted that, through the economic coercion of refusal to pay for safety work, it knew its contractors would do the project without such work, then its claim that it expected the contractors to do the work safely would be utterly impeached. This would lead it to liability on the theory that it had an actual and effective control of the unsafe manner of work by control of the economic circumstances under which the work was done. The Circuit missed this issue too.

The law considered by the Circuit Court and applied by it in its original opinion had similar misconceptions.

Petitioner had made no claim that respondent had actual physical control of the contractor during the day to day work. Petitioner's theory was that such was immaterial because the character of the work had been entirely shaped by respondent's plans, and economic policies.

The knowledgeable landowner is liable when, as here, every act done by the contractor was approved by the landowner, if such acts are illegal or unsafe.

Funk v. General Motors Corp., 220 NW2d 641 (Mich. 1974)

Olson v. Hayden Holding Co., 70 P2d 463 (Utah 1937)

Dayton v. Free, 148 P 408 (Utah 1914)

Trecartin v. Mahony Troast Constr. Co., 87 A2d 349 (N.J. 1952)

Henigan v. Atlantic Refining Co., 282 FS 667 (E.D. Penn. 1967)

Quinones v. Township of Upper Moreland, 293 F2d 743 (3d Cir., 1961)

Sposito v. Zeitz, 127 NW2d 45 (Wis. 1965)

Summers v. Crown Constr. Co., 453 F2d 998, (C.A. 4, 1974)

Lindler v. District of Columbia, 502 F2d 495 (D.C. Cir., 1974)

Davis v. Summerfield, 45 SE. 654 (N.C. 1903)

Semanchuck v. Fifth Ave. & Thirty-Seventh St. Corp., 49 NE2d 507 (N.Y. 1943)

Nauman v. Harold K. Beecher & Assoc., 467 P2d 610 (Utah 1970)

Ross v. Hartman, 139 F2d 14 (D.C.App. 1943)

41 AmJur 2d, Ind. Contractors, §33, 37

57 AmJur 2d, Negligence, §24, 25, 36, 40, 239

Restatement of Torts, 2d Edition, §410, 413, 415, 424, 427, 496E

In respondent's brief, it omitted petitioner's cited cases, but instead set up a straw-man in which the issue at trial was actual physical control by respondent of the contractor, demonstrated that petitioner had not proved this, and so argued that it was entitled to a reversal of the jury verdict.

The Circuit Court in its opinion did not mention petitioner's cases but only respondent's cases, based its decision on lack of actual control, and commented in passing that petitioner's other legal theories had not been established. It stated factually that "on this record" petitioner did not have a case.

That petitioner's brief simply was not given adequate reading by the Circuit Court when it wrote its opinion is clear.

The matter now turns to post-appeal events.

On receiving the initial Circuit Court opinion, petitioner chose to return in compliance with its mandate to the trial court. Because the Circuit Court entirely missed the salient facts of the case and petitioner's theory of law, petitioner's research convinced him that Judge Anderson could act in regard to those, the mandate applying only to facts and theories it had covered. *U. S. v. Ohio Power Co.*, 353 US 98; *Nelson v. Mecham*, 155 F. 1 (9th Cir.).

On retrial, Judge Anderson dismissed stating specifically that he had to do so because he had no choice under the appellate opinion, but then set out the actual facts of the case to serve as a guide to the appellate court on its reconsideration, these facts being in diametric opposition to those originally found by the Circuit and as submitted to it by respondent.

On the second appeal, petitioner submitted a brief very precisely documenting the discrepancies between the trial testimony and respondent's brief.

In its final and second opinion, the Circuit Court dismissed petitioner's case with prejudice stating that it had previously ruled on the facts and did not need to review them. It refused to consider, review or even mention Judge Anderson's findings of fact.

The concurring opinion acknowledged that Judge Doyle's dissent was probably accurate on the facts, but indicated that it was not the duty of the appellate court to review conflicting charges between counsel and so concurred to form a majority.

The dissenting opinion found that on the facts petitioner had an entirely legitimate case, that he had been denied justice in appellate court and that his case should be reinstated.

Petitioner then filed for Writ of Ceriorari to the Supreme Court which was denied.

Petitioner then filed again with the Circuit Court for review based on fraud on the court and himself.

It is from the peremptory denial of that motion that he now petitions for relief.

Two other actions of the Company on appeal serve to illustrate the practiced case, and immunity from reprisal, with which it maneuvered the Circuit Court.

One was that it filed a motion to dismiss the first appeal of petitioner on the ground that it was improperly filed.

Petitioner responded with a short brief that pointed out that the companies own citations supported petitioner, and that the motion was groundless.

The Circuit Court agreed as it dismissed the companies motion per curiam.

In so doing the court awarded no fees, imposed no sanctions.

Thereby the company was the winner as its mo-

tion had stalled the legal machinery for months. One of the major advantages a corporate litigant has over an individual is staying power, and here the company gained a time advantage. The delay also gave it secondary gain — if it couldn't avoid an adverse ultimate precedent, by delay it could continue its work practice longer.

This gain persists today, five years after trial.

The second action of maneuver was the use of Workmans Compensation laws as a defense to the lawsuit.

The company raised it as a defense in its answer It then waived the issue at pretrial and trial because it could only claim to be a third party beneficiary of the Workmans Compensation ban against suit against an employees employer if it admitted that it was in actual control of the immediate employer.

As the company was not willing to concede this actual control, it abandoned the defense, producing no evidence on it at trial, submitting no instruction on it, and not preserving it previously as a legal issue at pretrial.

Having thus utterly waived Workman's Compensation as a defense at trial, what did the company do with that defense on appeal when it needed any defense it could find?

Right.

The company put a third of its appellate brief into Workman's Compensation as a viable defense.

In so doing it made no mention of its having waived the issue at trial, no mention of any kind, even though a party on appeal has a clear duty to bring new or omitted issues to the attention of the appellate court, so that it can consider not only the issue, but also its standing.

Petitioner filed a rebuttal brief documenting the waiver, which the Circuit Court accepted because it has no word on Workman's Compensation in its opinion.

The companies tactic was justified. It risked nothing. The appellate court didn't touch the problem of the companies having deliberately raised an issue as live rather than dead.

These last two examples don't deal now directly with the merits of the case, having been defeated. Their only relevance is that they show again the willingness of the companies attorneys to stop at nothing in their attempt to win.

They also show why lawyers do this — there is no penalty.

FEDERAL JURISDICTION IN FIRST INSTANCE

This case originally was brought in the United States District Court for the District of Utah, Central Division, invoking jurisdiction through 28 USC §1332.

REASONS FOR ALLOWANCE OF WRIT

In his concurring opinion, Judge McKay wrote:

> "In a growing number of cases, adversarial rivalry has degenerated into accusations of unethical conduct."

There was a time after the Rules of Civil Procedure were first enacted when they served as a breath of fresh air cleaning the body juris of stagnant growths.

Their high purpose was stated at the very outset as Rule 1, which has three simple, magnificent, adjectives. Civil litigation was to be "just," "speedy," and "inexpensive."

Since then, many attorneys and clients have realized that the goals of their particular client are best served by reversing the three concepts of Rule 1.

In the area of corporate law, for example, a corporation which has a defective product will not want to yield readily the complete details of the defects. As a matter of corporate policy, it will want to do everything in its power to obstruct verdicts against it. This is not improper on the part of the corporation. It is not bound by a professional code of ethics, but rather has responsibilities to its stockholders.

Such a corporation will want an attorney who will serve this corporate policy.

The question is whether the attorney will comply, or will impose his professional standards.

As an example, the following are four recent citations involving one of the most respected American corporations. In these opinions, it could scarcely receive stronger adverse judicial language. However nothing happened to it nor its counsel. *Rozier v. Ford Motor Company,* 573 F2d 1332 (5th Cir. 1978), *Green*

v. Shepherd Construction Co., (N.D. Ga.) as cited in *Bollard v. Volkswagon of America, Inc.*, 56 FRD 569, at note 3 pp. 582-583, *Parrett v. Ford Motor Company*, 52 FRD 120 (D.C. Mo. 1969), *Buehler v. Whalen and Ford Motor Company*, 374 NE2d 460 (Ill. 1977).

The conscientious attorney greatly needs the help of the courts to tell his client, "No, you can't get away with this, you will have your pleadings stricken, and I will be in trouble with the court."

Other attorneys have no such moral dilemmas. Their pragmatic approach is simply to determine what has to be done to get the job done and do it, the end justifying the means. They proceed without ethical self-examination. Ethics are spelled "WIN."

This burden of holding litigants firmly to Rule 1 must be met by the courts themselves.

The knowledgeable attorney representing prestigious clients knows that he is immune from disciplinary proceedings by his Bar. Attached as Appendix F is a newspaper article in Salt Lake City, Utah, in November, 1979. The pertinent item in the article is the statemen, which was unrebutted, that no member of a prestigious firm in Utah had been subject to Bar sanctions in the preceding 25 years.

The above reflects only practice in a small state, but to counsel's understanding, it is typical of others. This means that if courts are to protect themselves and if courts are to assist counsel who have ethical and fi-

nancial dilemmas, and control attorneys who don't, the courts must respond to this "growing number of cases" by acting affirmatively.

A common tactic is the refusal to admit adverse facts. The attorney sees that if he admits certain facts, his client may well lose the case, and then he may well lose the client. Fictions are substituted for those facts. As Aaron Burr cynically observed, "The law is that which is plausibly argued." The tragedy is that he based his observation on experience.

Judge McKay referred to the improper "charges and countercharges of adversial misconduct," and said these should be in side briefs so as to not distract from the main issues.

His wish to keep the mud outdoors is understandable, but he failed to make a vital distinction. In some cases squabbling can be only that, distasteful but unimportant conflict. In other cases, and this is what he overlooked, it is not matter that can be separated from the main issues because it deals with them directly. That occurs when the party with a losing case seeks to escalate it to a winner by improper tactics.

When that occurs, opposing counsel, to protect his client and to keep the court from being led into error, has the positive duty of clearly calling the matter to the attention of the court.

There is a cheerful side to the judicial scrutiny. It will frequently lead the court to a right verdict.

This case is a classic example. The appellate court was so far misled that it actually reversed based on the courts major instruction to the jury on the facts and on the law, being so far wrong on both fact and law as to be reversible error. If this were so, surely respondent would have fought the instruction at trial and on appeal. However, respondent did, not mention the instruction once in its brief on appeal.

In petitioner's Petition for Rehearing to the Circuit Court, he acknowledgd the mechanical difficulty of the Circuit Court doing minute review of conflicting argument and suggested that such matter could be referred to masters, to the trial court, or even to law schools for an amicus report on the accuracy of the pleadings.

The Circuit Court chose to do none of these and allowed the injustice so stingingly attacked by Judge Doyle in his dissenting opinion to become permanent by simply dismissing the case.

A chose in action and a judgment are property rights, and so protected by the Fifth Amendment.

A basic premise of due process of law is that the court must find what the facts were. *Lehnen v. Dickson*, 148 US 71 (1893) at p. 77. Daniel Webster, in his argument in the Dartmouth College case, *Dartmouth College v. Woodard*, 4 US 518, (1819), declared what is meant by due process of law is "a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."

In the event of irreconcilable conflict between briefs, it was the duty of the court to accept those facts most favorable to petitioner. *U.S. v. Jefferson Electric Manufacturing Company*, 291 US 386. In the instant case, the Circuit Court of Appeals failed to review the findings of the Trial Judge, and refused to examine the conflicting claims. Nevertheless, it entered its opinion, denying petitioner his right to favorable review.

Excavation work is dangerous. Each year there are casualties in cave-ins. This is a case where a precedent will serve to save lives.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Tenth Circuit, or alternatively, that the case be returned to the Circuit Court for appropriate en banc review.

Respectfully submitted,

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Counsel for Petitioner

December 20, 1979.

APPENDIX A

NOT FOR ROUTINE PUBLICATION

United States Court of Appeals
Tenth Circuit

Nos. 76-1030-31

GLENN H. SEWELL,

Appellant,

v.

PHILLIPS PETROLEUM COMPANY
a Delaware corporation,

Appellee.

Appeal From The
United States District Court
For The District of Utah
Central Division
(D. C. No. C 74-40)

Samuel King, Salt Lake City, Utah, for Appellant.

Ray R. Christensen, of Christensen, Gardiner, Jensen & Evans, Salt Lake City, Utah, and Chris Wangsgard, of Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Appellee.

Before SETH and HOLLOWAY, Circuit Judges, and CHILSON, United States Senior District Judge*

SETH, Circuit Judge.

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* Of the District of Colorado,
Sitting by Designation.

The plaintiff brought this action against the defendant for personal injuries received when part of the side of an excavation fell on him. The plaintiff was employed as a laborer by Harvey W. Eckman & Associates which had contracted with the defendant to install 10,000-gallon underground gasoline storage tanks at forty-two of defendant's service stations. The accident occurred when the plaintiff was working at the bottom of an excavation eleven and one-half feet deep.

The case was tried to a jury which returned a general verdict for plaintiff, who is the appellant. The appeal is taken from the refusal by the trial court to submit the issue of punitive damages to the jury. The appellee has taken a cross-appeal on the general verdict on the ground that the instructions given as to the relationship between the landowner and an independent contractor were erroneous.

The defendant provided Eckman with the plans, drawings, and specification for the installation of the tanks. The drawings or specifications did not include shoring or sloping of the walls of the pit. The contract between the defendant and Eckman provided that the defendant had the right to inspect the work being done, and reserved "the right of suspending the whole or any part of the work to be done hereunder at any time its best interest appears to be served by so doing." Eckman had the contractual duty to obtain all necessary permits and to comply with all laws, building regulations, and codes. He was to "diligently perform the work in accordance with good industry practices and in

a workmanlike manner" along with the "entire responsibility for examination of the site of the work and for acquaintance with conditions that may exist or develop during the term of the contract." Eckman was also to adhere to and enforce all safety and fire protection rules of the defendant during the performance of the work.

Evidence was introduced that the defendant could also inspect for safety. The defendant's representative Neuzil knew that the excavation did not conform to OSHA regulations. Such regulations were not applicable to the job. They were considered during the trial as an expression of opinion as to proper practice. Neuzil was concerned about the safety of an open pit and felt that the excavation was safe for men to work in.

There is no question that Eckman was an independent contractor. The plaintiff thus sought to impose liability on the defendant on the theory that a landowner had breached a duty to a business invitee; or on the theory that there was an exception to the independent contractor rule because the owner retained control of the work; or that the work was inherently dangerous.

The plaintiff submitted evidence on a punitive damages allegation. The allegation was that the defendant had deliberately and wrongfully acted in not having the excavations shored or sloped and had shown an indifference as to whether or not others were harmed. This issue was not submitted to the jury because of insufficient evidence.

To impose liability on the defendant there must be shown an exception to the general rule of nonliability for torts of an independent contractor either through the exercise by the defendant of control over a delegable duty, or by showing a nondelegable duty. Dayton v. Free, 46 Utah 277, 148 P. 408.

On the matter of retained control, the evidence shows that defendant had the right to inspect the work, and could stop the work, according to the contract, ". . . any time its best interest appears to be served by so doing." However this reservation does not of itself override the general rule of nonliability by control. United States v. Page, 350 F.2d 28 (10th Cir.). There was shown no active participation in the work by the defendant's inspections of the job site. The defendant never exercised control of the work and Eckman was under a contractual duty to comply with proper procedures. Eckman had the basic duty to provide the plaintiff with a safe place to work and guard against dangers created by the work. Dayton v. Free, 46 Utah 277, 148 P. 408; Texaco, Inc. v. Pruitt, 396 F.2d 237 (10th Cir.).

The plaintiff urges that the defendant actively participated in the work because the drawings and specifications did not provide for sloping or shoring. It is also asserted that the defendant acquiesced in unsafe practices by its failure to correct them, by accepting the work complete as evidenced by the payment, and by having the contract provide that the work be performed "to the entire satisfaction of the Company Representa-

tive in accordance with the drawings, plans, and specifications furnished" by the defendant. The plaintiff argues that by this the defendant was exercising control over the manner in which the excavation was to be performed, and was inherently dangerous. Dayton v. Free, 46 Utah 277, 148 P. 408.

Evidence was adduced that the bids by Eckman were made without any allowance for sloping or shoring and in accordance with the drawings. The contract specifically provided that Eckman was to obtain all necessary permits and to comply with all safety regulations. Eckman testified that he was not aware of any particular sloping or shoring regulations. He testified that his bids were based on a normal excavation with firm soil for stable walls and without any water or other problems. This particular excavation did have some water which was pumped out but Eckman thought it was safe. Eckman testified that if he encountered soil problems, he would slope to the degree he felt necessary to provide a safe excavation and the defendant always paid him for it with no questions asked. The contract had a provision for extra work. Under these circumstances, although the drawings and specifications did not specify sloping, they in themselves do not show control in the absence of some affirmative act. United States v. Page, 350 F.2d 28 (10th Cir.)

The court's jury instruction No. 18 did not adequately state the necessary "retained and exercised control" over the work to find liability for the cave-in. The instruction required that the owner be aware of a known

risk or should have known and been aware of the contractor's failure to guard against it, and that the owner reserve the right to stop the work at any time when safety requirements are not met. The awareness and the right to stop do not show a "retained and exercised control" without some other active participation. The instruction was clearly erroneous. The defendant, on this record, did not retain control of the work.

The Utah courts have held that an injured party has a cause of action against an architect who had knowledge or should have known of an unshored trench where the architect had the contractual right and the duty to stop the work until the unsafe condition had been remedied. By the contract the architect was "to supervise and inspect all phases of the work being done" along with the reserved right to stop work for noncompliance. Nauman v. Harold K. Beecher & Associates, 19 Utah 2d 101, 426 P.2d 621. But in the subsequent case, Nauman v. Harold K. Beecher & Associates, 24 Utah 2d 172, 467 P.2d 610, the court held that there was insufficient evidence to show a breach of a duty or conduct below a standard of care for an architect where the walls of the excavation were sloped and the plaintiff knew of the conditions and found them to be safe. In a later case, Peterson v. Fowler, 27 Utah 2d 159, 493 P.2d 997, the court found no duty owed by the archiect to the injured employee because he had nothing to do with the scaffolding and his duty ran to the owner to see that the building was properly erected so that it would be safe for its intended purposes. The distinction for the existence of a duty is based on one of

control because in *Nauman* the architect had the affirmative duty to "supervise and inspect all phases" of the job, whereas in *Peterson* he did not have this control.

The plaintiff urges that because the landowner knew of the failure to slope or shore, it had a duty to warn or correct this violation, and having failed to do so, the landowner is liable for injuries to business visitors. The landowner is under a duty to warn or guard against concealed or latent conditions of danger on the premises of which he has or ought to have knowledge and of which the employee has none. Texaco, Inc. v. Pruitt, 396 F.2d 237 (10th Cir.); Titan Steel Corp. v. Walton, 365 F.2d 542 (10th Cir.). Yet the danger of the excavation is not inherent in the premises themselves, but it is a danger which arose from the prosecution of the work itself. Furthermore the danger of an excavation caving in is not concealed or latent, and the plaintiff had knowledge of this danger.

As for nondelegable duties which are described as being "inherently dangerous work," an excavation of this type is not inherently dangerous although there are safety precautions to be taken. Work that is inherently dangerous is work that will probably, and not merely may, cause injury if proper precautions are not taken. Dayton v. Free, 46 Utah 277, 148 P. 408. Predictability makes for a fine distinction between probably and may, but this excavation does not fall under the former. Furthermore, this Circuit has expressed "serious doubts as to whether the doctrine of nondelegable duty as here involved applies to injuries to employees of the

independent contractor." United States v. Page, 350 F. 2d 28 (10th Cir.). *Dayton* was cited by *Page* to support this proposition by its dictum.

The plaintiff urges that it was error for the trial judge to refuse to instruct the jury on the issue of punitive damages. The trial judge found that the evidence did not develop an issue on punitive damages. Smith v. Mill Creek Court, Inc., 457 F.2d 589 (10th Cir.). We must agree with this view because in order to justify an award of punitive damages in Utah, there must be a wrongful invasion of the plaintiff's rights which was done wilfully and maliciously. Palombi v. D & C Builders, 22 Utah 2d 297, 452 P.2d 325; Amoss v. Broadbent, 30 Utah 2d 165, 514 P.2d 1284. It depends not on the classification of the wrongful act but on the manner and intent with which it was done. Powers v. Taylor, 14 Utah 2d 152, 379 P.2d 380. In any event, the defendant owed no duty to plaintiff.

The judgment of the trial court is REVERSED, and the case is remanded for a new trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

GLENN H. SEWELL,

Plaintiff,

v.

PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,

Defendant.

ORDER OF DISMISSAL WITH PREJUDICE OF PLAINTIFF'S COMPLAINT

In Lieu of Findings of Fact and Conclusions of Law

No. C74-40

Defendant is a major petroleum producer and entered into a contract with Eckman & Associates, Inc., for the installation of gasoline tanks at a service station at 702 East 3300 South in Salt Lake City, Utah. The contract provided the contractor was to be an independent contractor and to provide the materials and labor, get the necessary licenses, and observe all laws in excavating the premises and installing the tanks. The contract further provided the contractor was to have complete control over the work.

Plaintiff was an employee of Eckman and working on the excavation when a cave-in occurred causing injuries for which this action was brought. There had

been no sloping of the sides of the excavation as local law required. The plans for the work were provided by the defendant and contained no requirement of sloping. A representative of defendant had visited the project occasionally and the company, from much past experience, reasonably could expect bidders would follow the plan provided. No Phillips representative was present when it happened.

The trial court first granted defendant's motion for summary judgment, holding the plaintiff's employer was an independent contractor and defendant, under applicable law, was insulated from any responsibility.

Upon a motion for reconsideration the trial court became persuaded it was a case that presented a jury question. Here the defendant company had vast experience in excavation and installation work, had an engineering department trained in precisely this kind of work and in this very community had previously contracted for many such jobs and been familiar with the local law requiring sloping. Notwithstanding the company drew plans for the work leaving out sloping, an expensive addition, and put it out to bid. The trial court was persuaded that under such circumstances, where the company gained an economic benefit from putting out a job for bid with a drawing for the work without sloping, an issue of whether this was negligence of the company should be presented to the jury, the theory being that such may be an exercise of control that would deprive the company of the protection of the contract placing responsibility with the independent contractor, but without making the company the plaintiff's employer.

The case was presented to the jury and plaintiff was awarded a verdict of $25,000. Plaintiff appealed the court's dismissal of the claim of punitive damages and defendant cross-appealed, contending there were no issues of fact for the jury and that, as a matter of law, judgment should be entered in favor of defendant no cause of action on plaintiff's complaint. The case was argued to the Court of Appeals in November, 1976, and on March 21, 1977, the Court handed down its decision reversing the judgment and remanding the case for a new trial.

Thereafter the trial court met with counsel for the parties to hold a pretrial in preparation for a retrial. It was stipulated that all of the evidence had been presented at the first trial and that the matter should be presented to the trial court, based on the records and brief of counsel, for its decision.

The court has carefully reviewed the facts in the record, the ruling of the Circuit Court of Appeals for the Tenth Circuit, the briefs of counsel and, deeming itself fully advised, enters the following as its ruling and verdict in the matter.

IT IS HEREBY ORDERED that defendant be granted a verdict of no cause of action on plaintiff's complaint.

The court believes that under the facts and the law provided by the Circuit this is the only verdict that could be entered. On page 3 of the opinion of the Appellate Court the Court ruled:

> There is no question that Eckman was an independent contractor.
>
> To impose liability on the defendant there must be shown an exception to the general rule of non-liability for torts of an independent contractor either through the exercise by the defendant of control over a delegable duty, or by showing a non-delegable duty.

The opinion then proceeds to demonstrate that neither of the two alternatives is present in this case. It follows, therefore, that plaintiff can establish no basis for liability.

In holding that the defendant retained no control of the work (over a delegable duty), the Court said:

> There was shown no active participation in the work by defendant's inspections of the job site. *The defendant never exercised control of the work* and Eckman was under a contractual duty to comply with proper procedures.
>
> * * *
>
> [a]lthough the drawings and specifications did not specify sloping, they in themselves do not show control in the absence of some affirmative act.
>
> * * *
>
> *The defendant, on this record, did not retain control of the work.* (Emphasis added.)

Since the parties have no more evidence to present, this ruling is determinative in this alternative.

As to the possibility of its being a situation of a non-delegable duty, the Appellate Court said:

> As for nondelegable duties which are described as being "inherently dangerous" . . . this Circuit has expressed "serious doubts as to whether the doctrine of nondelegable duty as here involved applies to injuries to employees of the independent contractor."

In concluding the opinion, the Court added:

> In any event, the defendant owed no duty to *plaintiff*. (Emphasis added.)

With the parties stipulating there is no more evidence to present, under the opinion of the Circuit there is nothing left to try.

Judgment, therefore, should be, and is, entered for defendant, no cause of action on plaintiff's complaint.

DATED this 20th day of September, 1977.

ALDON J. ANDERSON
United States District Judge

APPENDIX C

NOT FOR ROUTINE PUBLICATION

United States Court of Appeals
Tenth Circuit

No. 77-2072

GLENN H. SEWELL,

Appellant,

v.

PHILLIPS PETROLEUM COMPANY,
a Delaware corporation,

Appellee.

Appeal From The
United States District Court
For The District Of Utah
Central Division

(D.C. No. C 74-40)

Samuel King, Salt Lake City, Utah, for Appellant.

Ray R. Christensen, of Christensen, Gardiner, Jensen & Evans, Salt Lake City, Utah, and Chris Wangsgard, of Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Appellee.

Before SETH, Chief Judge, DOYLE and McKAY, Circuit Judges.

SETH, Circuit Judge.

We previously considered this case in Sewell v. Phillips Petroleum Company, Inc., Nos. 76-1030-31 (10th Cir. March 21, 1977). We held there that the crucial "retained control" jury instruction for imputing liability to an owner for injuries caused by a negligent independent contractor was erroneous, and that the evidence clearly failed to support plaintiff's alternative theories for imposing liability on the defendant. We reversed the general verdict in favor of plaintiff and remanded for a new trial. The parties stipulated to the trial judge on remand that no issue remained to be determined and agreed to submit the liability issue to the trial judge on the basis of the trial record. They also agreed that if the trial judge found in favor of plaintiff on the liability issue, then the case would proceed to a jury for a determination of damages. Since there was no further evidence to be presented, the trial judge entered judgment for the defendant in light of our holding.

Appellant complains here that he was entitled to judgment as a matter of law, and that our previous holding relied on misstatements of the facts in the defendant's brief. He also maintains entitlement to remand on the punitive damages issue which we considered and denied in our previous holding.

We believe it unnecessary to reiterate the relevant facts because they are discussed in detail in our previous holding. The case involved a suit for damages for injuries sustained by plaintiff while working in an excavated eleven-foot hole. Plaintiff was employed by

Harvey W. Eckman & Associates which had contracted with the defendant to install 10,000-gallon gasoline storage tanks at defendant's gasoline stations. Plaintiff's principal theory at trial was that defendant "retained and exercised control" over the contractor's work and was therefore liable for plaintiff's injuries. The relevant jury instruction failed to explain the necessity for "active participation" by the defendant as required by Utah law United States v. Page, 350 F.2d 28 (10th Cir.); Dayton v. Free, 148 P. 408 (Utah). We noted further that no evidence presented at trial indicated the defendant could be held liable under this theory or the alternative theories.

Appellant raises here the same issues discussed previously. No further evidence was produced on remand. We see no purpose in repeating the basis for our previous holding. Appellant's arguments are simply unpersuasive.

We do address, however, the contention that the previous holding relied on misstatements in the defendant's brief. The record clearly shows a lack of evidence supporting the "retained control" theory. Furthermore, on plaintiff's alternative business invitee theory, the danger arose from the work performed on the premises and was readily apparent to the plaintiff. Defendant was under no duty to guard against such an obvious danger. Texaco, Inc. v. Pruitt, 396 F.2d 237 (10th Cir.). Appellant's contention has no merit because the record provides the evidence necessary for determining that defendant was not liable as a matter of law.

No. 77-2072 — GLENN H. SEWELL, Appellant, vs. PHILLIPS PETROLEUM COMPANY, Appellee.

McKAY, Circuit Judge, concurring in the result:

Although I believe that the dissenting opinion may correctly characterize the result which should have been reached in the prior appeal brought in this case, I believe the instant appeal is in substance only a much-belated petition for rehearing. Rightly or wrongly, the issues that divide the other panel members were decided in the earlier appeal, and the time for asking this court's reconsideration of its determination has long since expired. All purported defects in the earlier disposition would have been known to appellant during the period in which filing for rehearing would have been timely. I therefore agree with the decision to affirm.

Nonetheless, I believe a troubling subsidiary matter should be addressed. There appears to be a substantial likelihood that disciplinary proceedings are in order. If counsel for appellant is correct, counsel for appellee deliberately misstated material facts to this court in the brief he filed in the prior appeal. If counsel for appellee is correct ,counsel for appellant has leveled false charges of serious professional impropriety against a member of the bar. Both charges are extremely grave. If either is true, disciplinary sanctions are in order.

We have not investigated the charges and counter-charges raised in this case, nor is such an undertaking

the proper responsibility of this court in the first instance. I am, however, mailing a copy of this opinion to the Commissioners of the Utah State Bar, of which both attorneys are members, for their appropriate disposition. I will also direct the clerk of this court to supply the Commissioners with copies of the relevant materials.

In a growing number of cases, adversarial rivalry has degenerated into accusations of unethical conduct. This court will not tolerate false charges of this variety. Neither will it abide the filing of dishonest statements by practitioners. We expect the highest standard of care by attorneys in correctly citing facts and cases. If necessary, when deliberate or grossly negligent miscitations occur, we will strike the briefs and leave the clients who are damaged thereby to malpractice remedies. We intend to apply an equal standard to false accusations of unethical conduct.

When misstatements of the type discussed here do occur, opposing counsel should note the errors in a responsive brief. Misconduct should not be so characterized in the briefs on appeal, lest the argument shift to focusing on the integrity of practitioners rather than the substantive issues raised in the appeal. Where the misstatements suggest the likelihood of misconduct, opposing counsel should file a charge with the appropriate bar authorities. We will ourselves be alert to whether the challenged statements suggest the propriety of disciplinary proceedings and will, as in the instant case, initiate appropriate action when the opposing attorney has not already done so.

Having outlined our views in this matter generally, we repeat that we express no view at this time concerning which attorney is correct in the instant dispute. We assume that the matter will be resolved in a more appropriate forum so that the rights of the litigants will not be further affected by this controversy.

I am authorized to state that Chief Judge Seth concurs in the views expressed in this opinion on the matter of professional misconduct on the part of attorneys who practice before us.

No. 77-2072 — GLENN H. SEWELL v. PHILLIPS PETROLEUM COMPANY

DOYLE, Circuit Judge, dissenting.

I respectfully dissent.

This case was appealed on a previous occasion. It was reversed and remanded for a new trial. The panel, with the exception of Chief Judge Seth, was different on the prior appeal.

The complaint was originally filed in this case on February 8, 1974. Plaintiff was injured as a result of the cave-in of an excavation wall in a pit in which he was working. This excavation was made on behalf of Phillips Petroleum Company, the defendant herein. The depth of this was 11'6". The sides, however, were perpendicular and it is said that this is what caused it to cave.

It is not disputed that both the Uniform Building Code which was in effect in Salt Lake City and also OSHA, the United States agency, which was concerned with employee safety, required sloping and shoring. *See* United States v. Dye Construction Company, 510 F.2d 78 (10th Cir. 1975).

In this instance the pit was excavated for the purpose of installing a gasoline storage tank at a retail service station. An independent contractor performed the work. However, he did not apply for a permit. Had he done so there would have been an inspection together with orders requiring the sloping in accordance with the city ordinance and OSHA regulations.

The evidence established that the particular excavation was one of a large number in Salt Lake City by Phillips in order to store unleaded gasoline. Phillips was fully aware of the manner of excavating and was aware that it was illegal. There was evidence to show that proceeding without a permit and not sloping or shoring was the policy of Phillips. The evidence also showed that Phillips furnished the blueprint or plan for the excavation and installation of the tank. This called for a pit with perpendicular walls.

Plaintiff made the mistake of appealing the trial court's denial of punitive damages. The defendant cross-appealed the judgment on the merits. This court rejected plaintiff's appeal and adopted that of Phillips. The theory was that Phillips was shielded by the independent contractor concept.

The source of this disagreement goes back to the first appeal following the original trial of the case. The trial had been to a jury in early October 1975. On that occasion special interrogatories were submitted to the jury, and as a consequence of the jury's responses a verdict in the amount of $25,000 was returned in favor of the plaintiff. In answering the interrogatories, the jury responded that the defendant Phillips Petroleum Company was the proximate cause of the injury to the degree of 100%. Judgment was entered accordingly. The appeal which is referred to above followed.

This court reversed in an opinion filed March 21, 1977. It emphasized that Mr Eckman had been employed by Phillips under an explicit contract which provided that he was an independent contractor. He was to dig an 11'6" pit in which the gasoline tank would be placed. In general, this court's opinion followed the proposition that in order to impose liability on the defendant, considering that Eckman was an independent contractor, it would have to appear that an exception existed to nonliability for torts of an independent contractor. The court went on to find that such exception was not present.

The basis on which the verdict was rendered at the trial was that Phillips, in truth, controlled the project; that it was hazardous to fail to perform sloping and shoring in a pit this deep; that such sloping and shoring was required by the County of Salt Lake and also by OSHA, a federal agency. It was also brought out that Phillips was fully aware of the fact that these pre-

cautions which were required by law had not been taken. Indeed, Phillips prepared the drawings and specifications which called for a perpendicular pit and which did not provide for sloping or shoring. It was also shown that this particular contractor was regularly employed, had excavated a large number of these in accordance with Phillips' plans, and with the full knowledge of Phillips. These facts resulted in Phillips having independent responsibility for the injury.

The opinion of this court remanded the case for a new trial. However, the trial judge concluded that he was unable to conduct a new trial in view of the decision. The court proceeded to enter an order of dismissal of the complaint with prejudice. In that order of dismissal it was pointed out that the contract provided that the contractor was to be an independent contractor, who would provide the necessary materials and labor, get the necessary licenses and observe all laws in excavating the premises and installing the tanks. The wording of the contract also provided that the contractor was to have complete control over the work.

While plaintiff, the order continued, was working on the excavation, a cave-in occurred causing his injuries. "There had been no sloping of the sides of the excavation as local law required. The plans for the work were provided by the defendant and contained no requirement of sloping." A representative of defendant had visited the project occasionally and the company, from past experience, could expect bidders would follow the plan provided. No Phillips' representative was present when it happened.

The trial court wrote that it had first granted the defendant's motion for summary judgment on the basis that defendant was insulated from responsibility, but upon reconsideration it became persuaded that it was a case that presented a jury question considering that the defendant company had vast experience in excavation and installation work, had an engineering department trained in this kind of work, and "in this very community had previously contracted for many such jobs and been familiar with the local law requiring sloping, not withstanding that the company drew plans leaving out sloping, an expensive addition, and put it out to bid." The court said that since the company had gained an economic benefit from putting out a job for bid with a drawing for the work without sloping, the issue of whether this was negligence should be presented to the jury, on the theory that such may be an exercise of control that would deprive the company of the protection of the contract which placed responsibility with the independent contractor. The court then went on to say:

The case was presented to the jury and plaintiff was awarded a verdict of $25,000. Plaintiff appealed the court's dismissal of the claim of punitive damages and defendant cross-appealed, contending there were no issues of fact for the jury and that, as a matter of law, judgment should be entered in favor of defendant no cause of action on plaintiff's complaint. The case was argued to the Court of Appeals in November, 1976, and on March 21, 1977, the Court handed down its decision reversing the judgment and remanding the case for a new trial.

Thereafter the trial court met with counsel for the parties to hold a pretrial in preparation for a retrial. It was stipulated that all of the evidence had been presented at the first trial and that the matter should be presented to the trial court, based on the records and brief of counsel, for its decision.

The court has carefully reviewed the facts in the record, the ruling of the Circuit Court of Appeals for the Tenth Circuit, the briefs of counsel and, deeming itself fully advised, enters the following as its ruling and verdict in the matter.

IT IS HEREBY ORDERED that defendant be granted a verdict of no cause of action on plaintiff's complaint.

The court believes that under the facts and the law provided by the Circuit this is the only verdict that could be entered. On page 3 of the opinion of the Appellate Court the Court ruled:

> There is no question that Eckman was an independent contractor.
>
> To impose liability on the defendant there must be shown an exception to the general rule of nonliability for torts of an independent contractor either through the exercise by the defendant of control over a delegable duty, or by showing a non-delegable duty.

The opinion then proceeds to demonstrate that neither of the two alternatives is present in this case. It follows, therefore, that plaintiff can establish no basis for liability.

In holding that the defendant retained no control of the work (over a delegable duty), the Court said:

> There was shown no active participation in the work by defendant's inspections of the job site. *The defendant never exercised control of the work* and Eckman was under a contractual duty to comply with proper procedures.
>
> [a]lthough the drawings and specifications did not specify sloping, they in themselves did not show control in the absence of some affirmative act.
>
> *The defendant, on this record, did not retain control of the work.* (Emphasis added.)

Since the parties have no more evidence to present, this ruling is determinative in this alternative.

As to the possibilty of its being a situation of a non-delegable duty, the Appellate Court said:

> As for nondelegable duties which are described as being "inherently dangerous" . . . this Circuit has expressed "serious doubts as to whether the doctrine of nondelegable duty as here involved applies to injuries of employees of the independent contractor."

In concluding the opinion, the Court added:

> In any event, the defendant owed no duty to *plaintiff*. (Emphasis added.)

With the parties stipulating there is no more evidence to present, under the opinion of the Circuit there is nothing left to try.

Judgment, therefore, should be, and is, entered for defendant, no cause of action on plaintiff's complaint.

DATED this 20th day of September, 1977.

I have quoted and shown the trial court's opinion on remand in detail for the reason that it shows, in my opinion, that the trial court was somewhat startled to receive this court's opinion, and I must confess that I had similar feelings when I first heard the case on the present appeal. My first exposure to the case was the occasion of oral arguments on the second appeal.

Being of the opinion that there has been a miscarriage of justice, it is my conclusion that the judgment of the district court should be at this time reinstated in the interest of justice. Such action has been taken on past occasions.

The reason for my dissent is my conviction that the concept of independent contractor is capable of shrouding a great many sins; that it will not succeed where, as here, a statute or ordinance imposes a duty to provide specified safeguards or precautions for the safety of others. This is expressed in the Restatement of the Law Second, § 424, which provides:

> Precautions Required by Statute or Regulation
> One who by staute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

So, under this principle, the owner will not be heard to say that it was the duty of the contractor to fulfill the duties imposed by statute This is because the duty is on the owner to comply with the law and he cannot pass the buck. If he could, avoidance would be quite simple. The owner could avoid the law by entering an airtight contract with an "independent contractor."

The guiding principles are set forth in somewhat more detail and clarity in an annotation reported in 41 Am. Jur. 2d, *Independent Contractors* § 37 (1968), at 799-780:

> Generally speaking there are many situations in which a person cannot absolve himself from liability by delegating his duties to an independent contractor. An employer has a nondelegable duty with respect to the taking of precautions during work which is dangerous in the absence of such precautions, which is inherently or intrinsically dangerous, or which from its nature is likely to render the premises dangerous to invitees, and also has a nondelegable duty with respect to the conduct of ultrahazardous work. Where a person, either by contract or by law, owes an obligation to another, he cannot escape liability for negligence in performance of such obligation by delegating the duty to an independent contractor. Thus, if a statute or ordinance requires a person to take certain precautions when work is being done, and such precautions are not taken, it is no defense that an independent contractor was employed to do the work and that the failure to take the precautions was due to the contractor's negligence. Likewise, one who, by a specific agreement, undertakes to do

> some particular thing, or to do it in a certain manner, cannot, by employing an independent contractor, avoid responsibility for an injury resulting from the nonperformance of any duty or duties which, under the express terms of the agreement or by implication of law, are assumed by the undertaker. An exception to the general rule of nonliability of an employer for the negligence of an independent contractor or the latter's servants exists where the employer has assumed a contractual obligation to perform the work.

At bar we have an activity which is inherently hazardous. The hazard is recognized by statute and ordinance. In addition, we have an owner who provides plans which do not attempt to adopt safeguards. In fact, it knowingly encourages the doing of the work without taking safeguards. Phillips would be liable for the failure of the contractor to follow its orders. It is certainly liable where the contractor follows its orders and thereby creates the risk.

One recent example is that which occurred in Pierce v. Cook & Co., Inc., 518 F.2d 720 (10th Cir. 1975). In Pierce v. Cook, *supra*, the action was for wrongful death in an automobile collision. The truck driver had been hauling wheat for the defendant-appellee in the case, Cook & Co., Inc. The trial court entered summary judgment. This was appealed and affirmed by this court. The judgment became final in 1971. The accident had actually happened in 1968. Relief was sought in the federal court based upon a change of law in the Oklahoma state court. The Oklahoma Supreme Court had overruled the prior decision

which had strictly applied the independent contractor rule and had concluded that where there is a foreseeable risk of harm to others unless precautions are taken, one who is regularly engaged in a commercial enterprise as an integral part of the business is responsible for failure to exercise care in selecting a competent carrier. Failure to do so rendered him liable.

When this change of law was announced, a motion for relief was filed by the aggrieved party under Rule 60(b). Notwithstanding that this court's prior decision had become final in 1971, relief was granted following presentation of the case to this court en banc. The cause had been removed to federal court, and after the state court rule was changed, we held in an opinion by Judge Breitenstein that in this extraordinary condition, the plaintiff was the victim of an injustice, and although we did not reverse the decision of the trial court, we commended the Rule 60(b) motion to it.

While an appellate court will generally refuse to reopen a final judgment entered in a prior appeal, it will do so when substantial justice warrants. *See* 9 Moore's Federal Practice ¶ 110.25[2], at 274-75 (2d ed. 1975). The law of the case doctrine bars a second review of established law unless compelling circumstances warrant the action.

The Supreme Court has long recognized that an appellate court may review its earlier decision in a case and reopen that case when circumstances warrant it. *See* Messenger v. Anderson, 225 U.S. 436 (1912).

Bromley v. Crisp, 561 F.2d 1351, 1363 (10th Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), recognized that this court could depart from its own earlier decision in the identical case when circumstances warranted such departure.

Other circuits have also recognized that where circumstances warrant reopening of an earlier appellate decision in the same case, such procedure may be pursued.

The Eighth Circuit has said that the earlier judgment will not be disturbed unless clearly erroneous and manifestly unjust *See* Wrist-Rocket Mfg. Co. v. Saunders Archery Co., 578 F.2d 727, 730-31 (8th Cir. 1978).

The Fifth Circuit has said that a second review is permissible "if considerations of substantial justice warrant it." Lehrman v. Gulf Oil Corp., 500 F.2d 659, 663 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). Clearly a prior decision is not to be reopened and reversed except upon the basis of cogent reasons and to avoid manifest injustice. *See* Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 19-20 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974).

The Sixth Circuit has refused to review a prior decision unless a new statute or intervening Supreme Court decision raises questions as to the viability of the earlier decision. Hawkes v. Internal Revenue Service, 507 F.2d 481, 482 n.1 (6th Cir. 1974).

In one instance the First Circuit refused to reopen a civil case, but recognized that it could be done in the case in which the previous error constituted a manifest injustice. White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1974).

In the present case the mix-up occurred because of the fact that the contract between Phillips Petroleum Company and the independent contractor purported to place all of the responsibility on the independent contractor, but when the case was tried a far different condition was revealed. It was shown that Phillips in actuality had exercised a good deal of control over the project and that it was the author of the plans which took the less expensive way out, that of not taking steps to prevent cave-ins. Thus, where it had control of the condition and acted negligently, that is, where it could reasonably foresee that a workman was going to be injured from this practice, it should be held responsible to the workman for its own negligent conduct. That is what the trial court held and that is the correct approach to the case. It is an approach that is not at odds with Utah law.

Here we have an activity that was contrary to law, both local and federal, which plainly created a hazard and thus the trial court was plainly correct in the first case in submitting the case to the jury. The jury's verdict was well founded both in law and in fact. A plain injustice occurred as a result of the reversal. The trial court was unable to carry out the mandate which ordered a new trial because the law of the case contained

in this court's decision closed the door to a new trial. There was nothing for the trial court to do except vacate the judgment based upon the jury verdict and enter judgment for Phillips, which it did.

In this case the injustice which the litigant has suffered is clear. There is not and was not any way which would allow Phillips to shift responsibility to the contractor. To allow it to do so constituted grave error which should be corrected.

The case should be reopened in the interest of justice.

APPENDIX D

UNIFORM BUILDING CODE
CHAPTER 70
EXCAVATING AND GRADING

PURPOSE

Sec. 7001. The purpose of this Chapter is to safeguard life, limb, property and the public welfare by regulating grading on private property.

SCOPE

Sec. 7002. This Chapter sets forth rules and regulations to control excavation, grading and earthwork construction, including fills and embankments; establishes the administrative procedure for issuance of permits; and provides for approval of plans and inspection of grading construction.

PERMITS REQUIRED

Sec. 7003. No person shall do any grading without first having obtained a grading permit from the Building Official except for the following:

2. An excavation below finished grade for basements and footings of a building, retaining wall or other structure authorized by a valid building permit. This shall not exempt any fill made with the material from such excavation nor exempt any excavation having an unsupported height greater than 5 feet after the completion of such structure.

8. An excavation which (a) is less than 2 feet in depth, or (b) which does not create a cut slope greater than 5 feet in height and steeper than one and one-half horizontal to one vertical.

DEFINITIONS

Sec. 7005. For the purposes of this Chapter the definitions listed hereunder shall be construed as specified in this Section.

EXCAVATION is the mechanical removal of earth material.

GRADE shall mean the vertical location of the ground surface.

GRADING is any excavating or filling or combination therof.

GRADING PERMIT REQUIREMENTS

Sec. 7006. (a) Permits Required. Except as exempted in Section 7003 of this Code, no person shall do any grading without first obtaining a grading permit from the Buiding Official. A separate permit shall be required for each site, and may cover both excavations and fills.

(b) Application. The provisions of Section 301 (b) are applicable to grading and in addition the application shall state the estimated quantities of work involved.

(c) Plans and Specifications. When required by the Building Official, each application for a grading

permit shall be accompanied by two sets of plans and specifications, and supporting data consisting of a soil engineering report and engineering geology report. The plans and specifications shall be prepared and signed by a civil engineer when required by the Building Official.

(d) Information on Plans and Specifications. Plans shall be drawn to scale upon substantial paper or cloth and shall be of sufficient clarity to indicate the nature and extent of the work proposed and show in detail that they will conform to the provisions of this Code and all relevant laws, ordinances, rules and regulations. The first sheet of each set of plans shall give the location of the work and the name and address of the owner and the person by whom they were prepared.

The plans shall include the following information:

1. General vicinity of the proposed site.

2. Property limits and accurate contours of existing ground and details of terrain and area drainage

3. Limiting dimensions, elevations or finish contours to be achieved by the grading, and proposed drainage channels and related construction.

4. Detailed plans of all surface and subsurface drainage devices, walls, cribbing, dams and other protective devices to be constructed with, or as a part of, the proposed work together with a map showing the drainage area and the estimated runoff of the area served by any drains.

APPENDIX E

OSHA REGULATIONS

§1926.651 Specific excavation requirements.

(c) The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.

(e) The determination of the angle of repose and design of the supporting system shall be based on careful evaluation of pertinent factors such as: Depth of cut; possible variation in water content of the material while the excavation is open; anticipated changes in materials from exposure to air, sun, water, or freezing; loading imposed by structures, equipment, overlying material, or stored material; and vibration from equipment, blasting, traffic, or other sources.

(g) All slopes shall be excavated to at least the angle of repose except for areas where solid rock allows for line drilling or splitting.

§1926.652

(a) Banks more than 5 feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. Refer to Table P-1 as a guide in sloping of banks. Trenches less than 5 feet in depth shall also be effectively protected when examination of the ground indicates hazardous ground movement may be expected.

(b) Sides of trenches in unsable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working with them. See Tables P-1, P-2 (following paragraph (g) of this section).

(c) Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each ½-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion.

APPENDIX F

'Should Be Free'

Court Hears Arguments On Control of Attorneys

By Dave Jonsson

Tribune Staff Writer

Utah lawyers should be free to join or not to join the Utah State Bar and this should have no bearing on their right to practice law, the Utah Supreme Court was told Monday.

Compulsory membership in the bar is a violation of attorneys' rights to associate or not associate with whom they wish, attorney Daniel L. Berman told the court.

The court heard arguments on a petition signed by 56 attorneys asking the high court to abolish the "integrated" bar and allow membership to be voluntary. Lawyers now must be members of the bar before they are allowed to practice law.

Dues Required

With membership comes the obligation to pay dues and Mr. Berman complained "I don't think it's right to require attorneys to pay fees to support such things as hiring of lobbyists to support or oppose legislation.

"The bar paid $10,000 last year for someone to lobby the Legislature in opposition to a bill that would end integration of the bar," Mr. Berman said.

Integration means that the bar and Supreme Court are formal partners in the admission and discipline of the members of the profession.

"No other profession has a situation where membership in an organization is compulsory before a person can practice his profession," Mr. Berman said.

Both Offensive

Under the Constitution, he said, "compelled association is just as offensive as compelled disassociation."

Arguing against the petition was Harold G. Christensen, former bar president, who said the bar commission "has been very careful in taking positions on partisan political issues."

He noted that the petitioners comprise only about 2 percent of the bar's 3,000 members.

Over the years, Mr. Christensen said, the partnership between the bar and the court has been "a good functioning system."

Better Remedy

"The remedy is not to dissolve the bar, but to correct the deficiencies found," Mr Christensen said.

In his brief Mr. Berman told the court that dues paid by members have gone into contributions to the International Women's Year, to support those opposing amnesty for Vietnam veterans and to back certain forms of no-fault insurance legislation.

"Discipline of its members has been weak," Mr. Berman said.

None in 25 Years

"In fact, no lawyer with a major or significant law firm has been disciplined in the past 25 years . . . they just go after the criminal violators and the oddballs.

"It would be naive to think that the only ethical problems we have are those that have come to the point of disciplinary proceedings, " Mr. Berman said.

Arguing another position, Steven W. Allred of the legislative general counsel's office, asked the court to consider taking only a "cautious look" at any requested changes in the current organization.

APPENDIX G

JULY TERM — SEPTEMBER 10, 1980

Before Honorable Oliver Seth and Honorable Monroe G. McKay, Circuit Judges.

No. 80-1861

GLENN H. SEWELL,

Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY,

Respondent.

This matter comes on for consideration of the motion of petitioner requesting the Court to issue a Writ of Review to review all proceedings in cases Nos. 76-1030 and 76-1031, the mandates of which issued April 12, 1977, and No. 77-2072, the mandate of which issued October 9, 1979. Petitioner moves the Court to reverse its judgment entered August 24, 1979, and enter judgment for him, remanding for new trial on general and special damages and for other relief. The petitioner suggests en banc review.

Upon consideration whereof, it is ordered:

1. The relief sought by appellant in its motion for relief filed August 19, 1980, is denied.

2. The panel members did not request a vote on the suggestion for en banc review.

Judge William E. Doyle, a member of the panel that rendered the decision sought to be reviewed, did not participate.

HOWARD K. PHILLIPS
Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Ray E. Christensen, attorney for respondent, 900 Kearns Building, Salt Lake City, Utah 84101. I further certify that all parties required to be served have been served.

SAMUEL KING

301 Gump & Ayres Building
2120 South 1300 East
Salt Lake City, Utah 84106

Counsel for Petitioner